IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 2285 of 2005

Jamdar Mohammed Sultan ..Petitioner

vs.

Karalmshi Monmshi Dedia ..Respondent

Mr.Asif Iqbal I.Patel for petitioner.

CORAM: A.P.SHAH J. **15th September,2005**

P.C.

. Heard Mr.Patel, learned counsel appearing for the petitioner. Perused the judgments of the courts below. Both the courts have recorded a concurrent finding of fact that the landlord has failed to prove that the tenant has carried structural additions and alterations of a permanent nature in the premises in question.

2. The learned counsel for the petitioner has not pressed the ground of carrying of permanent alterations but he submits that the landlord is entitled to possession on the ground of disclaimer of title. He took me through the written statement to show that the tenant had challenged the very existence of the landlord and tenant relationship and according to the learned counsel this by itself is a ground for eviction. Learned counsel, however, fairly stated that this ground was not raised before the lower courts. However, he stated that this being a pure issue of law the landlord is entitled to raise the same before this court.

3. In Lena Pereira Vs. Mary Boracho reported in 1991 Mh.L.J.761, B.N.Srikrishna J., as he then was, has held that unless disclaimer or disputing the landlord's title is made a ground for eviction, it would not be sufficient to claim an order of eviction merely on the ground that the tenant has, in the suit for eviction, raised a frivolous plea disputing the landlord's title. It was held that section 116 of Evidence Act does not furnish a ground for eviction. It merely enumerates the principle of estoppel which is merely an extension of the principle that no person is allowed to approbate and reprobate at the same time. The principle laid down in section 116 is that, having become a tenant and holding on to the property on the basis of the landlord's title, the tenant is not entitled to repudiate the title of the landlord. That does not mean that if he does so by way of a defence in a suit falling within the purview of the Rent act, there should be a decree forthwith for eviction. That rule of estoppel only means that a defence of such nature ought to be shut out and rejected by the Court. The judgment of B.N.Srikrishna was followed by Dhanuka J. in Bapubhai Papabhai Vs.Khairunnisa Abdul Kadar, 1992 Mh.L.J.521.

4. In any view of the matter the ground of disclaimer was not raised before the lower courts and it is not permissible for the petitioner to raise this ground for the first time in a petition under Art.227 of the Constitution. Petition is dismissed.